

74033-4

74033-4

Case No. 74033-4-I

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

---

JAMES C. FUDA, as Personal Representative of the Estate of AUSTIN  
FUDA, et al.,

Appellants,

vs.

KING COUNTY, a municipal corporation; LONI MUNDELL, a single  
person, et al.,

Respondents.

---

RESPONDENT MUNDELL'S BRIEF

---

Alfred E. Donohue, WSBA #32774  
WILSON SMITH COCHRAN DICKERSON  
901 Fifth Avenue, Suite 1700  
Seattle, WA 98161  
(206)623-4100  
(206)623-9273 facsimile  
*Attorney for Mundell*

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2016 OCT -7 PM 3:32

ORIGINAL

## TABLE OF CONTENTS

I. INTRODUCTION .....	1
II. ASSIGNMENT OF ERROR.....	2
III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	2
IV. STATEMENT OF THE CASE .....	2
V. ARGUMENT .....	5
A.    Plaintiffs' failure to assigned error to any issues relating to the Special Verdict in Ms. Mundell's favor requires affirmance of that decision.....	5
B.    The Court's decision regarding the verdict in favor of King County should have no bearing on the verdict in Ms. Mundell's favor .....	6
VI. CONCLUSION .....	10

## TABLE OF AUTHORITIES

### Cases

<i>Bjork v. Bjork</i> , 71 Wn.2d 510, 429 P.2d 234 (1967) .....	8
<i>Estate of McDill</i> , 14 Cal.3d 831 (1975) .....	9
<i>Ford Motor Credit Co. v. Uresti</i> , 581 S.W.2d 298 (Tex. Civ. App. 1979) .....	9
<i>Howell v. Spokane &amp; Inland Empire Blood Bank</i> , 117 Wn.2d 619, 818 P.2d 1056 (1991) .....	6
<i>Lahmann v. Sisters of St. Francis</i> , 55 Wn. App. 716, 780 P.2d 868 (1989) .....	9
<i>Mina v. Boise Cascade Corp.</i> , 104 Wn.2d 696, 710 P.2d 184 (1985) ...	6, 8
<i>Schneider v. Forcier</i> , 67 Wn.2d 161, 406 P.2d 935 (1965) .....	5
<i>Shreeder v. Davis</i> , 43 Wash. 129, 136, 86 P. 198 (1906) .....	8
<i>State v. Tanzymore</i> , 54 Wn.2d 290, 340 P.2d 178 (1959) .....	5
<i>Transamerica Ins. Group v. United Pac. Ins. Co.</i> , 92 Wn.2d 21, 593 P.2d 156 (1979) .....	5, 10
<i>Wigton v. Lavender</i> , 457 N.E.2d 1172 (Ohio 1984) .....	9

### Statutes

RCW 46.61.245 .....	3
RCW 46.61.500 .....	3
RCW 46.61.525 .....	3

### Rules

RAP 12.1(a) .....	5
RAP 12.1(b) .....	5

## **I. INTRODUCTION**

Respondent Loni Mundell is a defendant in this lawsuit brought by Appellants/Plaintiffs James Fuda, Dorianne Beaupre and Curt Beaupre in their various capacities. On September 4, 2015, a jury found by special verdict that Ms. Mundell was not negligent in an automobile accident resulting in the death of her two passengers. The jury separately found that co-defendant King County was also not negligent for its design or maintenance of the road on which Ms. Mundell was traveling at the time of the accident

In their Notice of Appeal, Appellants purport to appeal the entire Special Verdict and also list the Order on Defendant Mundell's Motions in Limine. However, their Opening Brief clarifies that they are not actually appealing the Special Verdict or any rulings before, during, or after trial as they relate to Ms. Mundell. Rather, Appellants' Opening Brief assigns error only to issues relating to their claims against King County. Appellants have not assigned error to and have not set forth any argument regarding any evidentiary rulings, any jury instructions, or any other issues relating to their claims against Ms. Mundell. Having failed to assign error or include any argument regarding their claims against Ms. Mundell, Appellants are foreclosed from asking this Court to reverse the Special Verdict in her favor. Ms. Mundell, therefore, respectfully requests that the Court affirm the Special Verdict as it relates to her.

## **II. ASSIGNMENT OF ERROR**

Appellants have assigned no error to any pretrial rulings, jury instructions, verdict, or post-trial rulings relating to their claims against Ms. Mundell.

## **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

Because Appellants have not challenged the Special Verdict finding that Ms. Mundell was not negligent in the automobile accident, should the Court of Appeals affirm that Verdict in favor of Ms. Mundell regardless of any decision it may make regarding the Special Verdict in King County's favor?

## **IV. STATEMENT OF THE CASE**

On November 7, 2008, sixteen-year-old Loni Mundell agreed to drive her two cousins Paul and Hunter to daycare. Because it was raining heavily, she also agreed to take her stepbrother Austin Fuda to school. After dropping Paul off at daycare, she drove along Green River Road heading toward Austin's school. Aug. 4 RP 190-91. It was raining hard. Aug 4 VRP 191. Loni was traveling between 28 and 30 miles per hour when her car went out of control.<sup>1</sup> The accident happened as she was going around a corner. RP 192. As she rounded the corner, the car slipped on leaves in the roadway. VRP 194. It then traveled across the other lane, down an embankment, and into the Green River. Aug. 5 RP 228. Ms.

---

<sup>1</sup> Ms. Mundell testified that the speed limit on Green River road was 35 miles per hour. Aug. 4 VRP at 190.

Mundell tried pulling her passengers from the car, but she could not get them free before the car sank in the river. RP 228-29. Austin and Hunter drowned.

James C. Fuda, as the Personal Representative of the Estate of Austin Fuda and on behalf of statutory beneficiaries James C. Fuda, Tyler Funda and Keleighn Fuda, filed suit against Ms. Mundell and King County. CP 120-134. The Complaint alleged that Ms. Mundell had driven negligently and that her negligence was a proximate cause of the accident. CP 127-28. Plaintiffs alleged that Ms. Mundell's conduct was negligent and/or wanton and that she violated three statutes—RCW 46.61.245,<sup>2</sup> 46.61.500,<sup>3</sup> and 46.61.525.<sup>4</sup> CP 126-27. Ms. Mundell denied these allegations and contended that she was not negligent in the operation of her car. CP 74-75.

Plaintiffs' Complaint also alleged that King County was liable for the two children's deaths because the roadway where the accident occurred was negligently designed and/or improperly maintained. CP 128. The claims against King County were based on different duties and

---

<sup>2</sup> RCW 46.61.245 provides: "Notwithstanding the foregoing provisions of this chapter every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway and shall give warning by sounding the horn when necessary and shall exercise proper precaution upon observing any child or any obviously confused or incapacitated person upon a roadway."

<sup>3</sup> RCW 46.61.500 provides: "Any person who drives any vehicle in willful or wanton disregard for the safety of persons or property is guilty of reckless driving."

<sup>4</sup> RCW 46.61.525 states: "A person is guilty of negligent driving in the first degree if he or she operates a motor vehicle in a manner that is both negligent and endangers or is likely to endanger any person or property, and exhibits the effects of having consumed liquor or marijuana or any drug or exhibits the effects of having inhaled or ingested any chemical, whether or not a legal substance, for its intoxicating or hallucinatory effects."

evidence than the claims asserted against Ms. Mundell. Compare CP 127–28 (claims against Mundell) with CP 128–30 (claims against King County).

Following a two-month trial, the jury was instructed on the law as to the basis for the potential liability of Ms. Mundell and King County. CP 2418 (summary of claims). The jury was also instructed that the claims against Ms. Mundell and the County were to be treated separately:

You should decide the case of each defendant separately as if it were a separate lawsuit. The instructions apply to each defendant unless a specific instruction states that it applies only to a specific defendant.

CP 2413 (Instruction No. 9). Appellants have not assigned error to this jury instruction.

Instruction 14 summarized the claims against each defendant and identified the specific bases for Plaintiffs' claims against the County. The instruction identified four separate ways that Plaintiffs alleged the County was negligent. CP 2418. Instruction No. 15 identified duties the County owed to the public. CP 2419. This instruction applied only to the Plaintiffs' claims against King County. Instruction No. 16 identified additional duties the County owed to the public, and addressed notice of dangerous or unsafe conditions. CP 2420. This instruction applied only to the claims against King County. Instruction No. 17 addressed testimony regarding guardrails or re-directional devices. This instruction also applied only to Plaintiffs' claims against King County.

By special verdict form, the jury found that Ms. Mundell was not negligent. CP 4122. The jury separately determined that King County was not negligent. *Id.*

## V. ARGUMENT

A. **Plaintiffs' failure to assigned error to any issues relating to the Special Verdict in Ms. Mundell's favor requires affirmance of that decision.**

Pursuant to RAP 12.1(a), “the appellate court will decide a case only on the basis of issues set forth by the parties in their briefs,” unless the Court determines that an issue not set forth in the briefs “should be considered to properly decide” the case. In that event, the Court will notify the parties and provide them an opportunity to present written argument on that issue. RAP 12.1(b). The present case involves no such issue. Plaintiffs’ assignments of error regarding their claims against King County are separate and independent of their claims against Ms. Mundell. Plaintiffs’ failure to assert any errors as to Ms. Mundell precludes the Court from taking any action other than affirming the verdict in Ms. Mundell’s favor.

Our courts have consistently recognized that they “will not consider issues on appeal that are not raised by an assignment of error.” *Transamerica Ins. Group v. United Pac. Ins. Co.*, 92 Wn.2d 21, 28, 593 P.2d 156 (1979) (citing *Schneider v. Forcier*, 67 Wn.2d 161, 406 P.2d 935 (1965); *State v. Tanzymore*, 54 Wn.2d 290, 340 P.2d 178 (1959)).

Similarly, “[i]f a party fails to support assignments of error with legal arguments, they will not be considered on appeal.” *Howell v. Spokane & Inland Empire Blood Bank*, 117 Wn.2d 619, 624, 818 P.2d 1056 (1991).

Plaintiffs have assigned no error to any issues regarding the verdict in Ms. Mundell’s favor and have included no legal argument regarding that verdict. Thus, to the extent Plaintiffs have attempted to call that verdict in favor of Ms. Mundell into question on appeal, the only proper course for the Court is to affirm the verdict finding that Ms. Mundell was not negligent.

**B. The Court’s decision regarding the verdict in favor of King County should have no bearing on the verdict in Ms. Mundell’s favor.**

If the Court reverses and remands for a new trial of Plaintiffs’ claims against King County, that decision should have no effect on the verdict in Ms. Mundell’s favor. The claims against the County may be retried without the need to retry the claims against Ms. Mundell.

When this Court orders a new trial, that trial “may be limited to certain issues where it clearly appears that the original issues were distinct and justice does not require resubmission of the entire case to the jury.” *Mina v. Boise Cascade Corp.*, 104 Wn.2d 696, 707, 710 P.2d 184, 191 (1985). Here, the claims against King County are distinct from those against Ms. Mundell and justice does not require that the claims against both defendants be resubmitted to a jury.

Appellants' negligence theories against King County and Ms. Mundell were distinct and unrelated to one another; neither theory required the success or failure of the other. Appellants alleged that Ms. Mundell had driven negligently and that her negligence caused the accident leading to the death of her stepbrother and cousin. Appellants alleged that Ms. Mundell could be liable for their deaths regardless of whether King County was negligent. Appellants alleged that King County had failed to properly design or maintain the roadway, and that King County could be responsible for the deaths of Austin and Paul regardless of whether Ms. Mundell was negligent.

In their Opening Brief, Appellants have challenged pretrial rulings excluding and/or limiting claims against King County (*Id.* at 21–29); evidentiary rulings during trial excluding and/or limiting evidence against King County (*Id.* at 29–35); and language in jury instructions relating solely to their claims against King County (*Id.* at 35–47). There is nothing in the entire brief that calls into question the verdict as it relates to Ms. Mundell. Therefore, if the Court were to reverse the verdict as to the County and remand for a new trial, there would be no need to retry the claims against Ms. Mundell.

Moreover, justice would not require the retrial of any issues relating to Plaintiffs' claims against Ms. Mundell if the Court were to order a new trial regarding the County. On the contrary, justice requires

Ms. Mundell be allowed to put this issue behind her. As the Washington Supreme Court has made clear, “[a]bsent supportable reasons the parties should not be subjected to the expense and strain of another trial before another judge.” *Bjork v. Bjork*, 71 Wn.2d 510, 511, 429 P.2d 234, 234 (1967). Here, there is no reason to subject Ms. Mundell to another trial because a jury has already concluded that she was not negligent and the Appellants have assigned no error to that finding.

The present situation is similar to that addressed by the court in *Shreeder v. Davis*, 43 Wash. 129, 136-37, 86 P. 198, 200 (1906). In that case, a verdict was entered against multiple defendants. Only one defendant appealed and the judgment as to that defendant was reversed. The non-appealing defendants claimed the reversal also operated in their favor. The Washington Supreme Court disagreed, noting that a statute in force at the time gave the court the authority to affirm, reverse, or modify any judgment or order appealed from, as to any or all of the parties. *Id.* at 132. The court concluded the “effect of the statute is to make every judgment, capable of being reversed, a several judgment for the purposes of an appeal.” *Id.* at 132-133. The same conclusion is true today. As confirmed by *Mina*, this Court has the authority to limit the new trial to only the claims Appellants have asserted against the County. *Id.* at 707.

This result is consistent with the rule found in other jurisdictions that a reversal as to one party will not justify reversal as to a non-

appealing party “unless the respective rights of the appealing and non-appealing parties are so interwoven or dependent on each other as to require a reversal of the whole judgment where a part thereof is reversed.” *Wigton v. Lavender*, 457 N.E.2d 1172, 1175 (Ohio 1984). *See also Estate of McDill*, 14 Cal.3d 831 (1975); *Ford Motor Credit Co. v. Uresti*, 581 S.W.2d 298, 300 (Tex. Civ. App. 1979). The claims against the County are not interwoven with or dependent on the claims against Ms. Mundell and may, therefore, be retried without submitting Ms. Mundell to a second trial.

Allowing retrial of only the claims against King County is further supported by the reasoning of *Lahmann v. Sisters of St. Francis*, 55 Wn. App. 716, 780 P.2d 868 (1989). In that case, the jury found one defendant was negligent, but it was unable to return a verdict for the other defendant. *Id.* at 719. The trial court declared a mistrial, and plaintiff moved for a new trial against both defendants. The court ordered a new trial against the defendant for which the jury could not reach a verdict, but dismissed plaintiff’s claim against the other defendant and plaintiff appealed. *Id.* On appeal, the court affirmed the decision, noting that “a declaration of mistrial as to one of the parties does not necessarily require a new trial as to the other parties.” *Id.* at 721. Similarly, if this Court concludes Plaintiffs are entitled to a new trial against the County, there would be no need to require a new trial as to Ms. Mundell. The Special Verdict in her favor

may properly be affirmed regardless of this Court's decision regarding the Special Verdict in the County's favor.

Appellants also allege "cumulative error denied Appellants a fair trial." Opening Brief at 3. But in support of this assignment of error, Appellants present no argument and cite to no errors relating to Ms. Mundell. *Id.* at 74-75 (alleged errors regarding discretionary immunity to King County, exclusion of evidence relating to barriers, and incorrect instructions about King County's duties). The Court should therefore not consider Appellants' cumulative error argument as it relates to Ms. Mundell. *Transamerica Ins. Group v. United Pac. Ins. Co.*, 92 Wn.2d 21, 28, 593 P.2d 156 (1979).

## VI. CONCLUSION

For the reasons stated herein, Ms. Mundell requests that the Court affirm the Special Verdict finding that she was not negligent. Ms. Mundell asks that the Court affirm the verdict regardless of the Court's ruling on Appellant's assignments of error relating to their claims against King County.

DATED and respectfully submitted this 7<sup>th</sup> day of October, 2016.

s/Alfred E. Donohue  
Alfred E. Donohue, WSBA #32774  
Wilson Smith Cochran Dickerson  
901 5<sup>th</sup> Ave., Ste. 1700  
Seattle, WA 98164  
Phone: 206-623-4100 / Fax: 206-623-9273  
Email: Donohue@wsed.com  
*Attorney for Respondent Loni Mundell*

## DECLARATION OF SERVICE

The undersigned certifies that under penalty of perjury under the laws of the State of Washington, that on the below date I caused to be served Respondent Mundell's Brief via electronic service to the following:

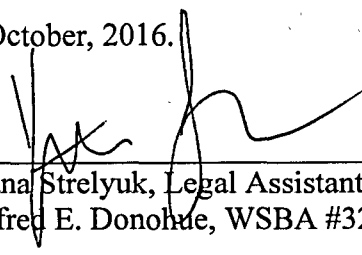
James J. Dore, Jr.  
Dore Law Group, PLLC  
1122 W. James Street  
Kent, WA 98032  
*Counsel for Appellants*

Daniel L. Kinerk  
Cindi Port  
King County Prosecuting Attorney  
500 Fourth Avenue, Ste. 900  
Seattle, WA 98104  
*Counsel for Respondent King County*

Paul J. Lawrence  
Matthew J. Segal  
Jamie L. Lisagor  
Pacifica Law Group LLP  
1191 2nd Ave Ste 2000  
Seattle, WA 98101-3404  
*Counsel for Respondent King County*

Scott Blankenship  
The Blankenship Law Firm, P.S.  
1000 Second Avenue, Suite 3250  
Seattle, WA 98104  
*Counsel for Respondent Loni Mundell*

DATED this 7th day of October, 2016.



---

Yana Strelyuk, Legal Assistant to  
Alfred E. Donohue, WSBA #32774